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In the

Supreme Court of the United States

October Term 1961

No. 38

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

BRIEF FOR RESPONDENT HENAGAN

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Questions Presented

1. Is the evidence sufficient to support the verdict?

2. Does error appear in regard to the railroad's motion for new trial?

Statement

Petitioner's statement omits the relevant matter summarized below.

The engineer Crafts testified that he did not see the

deceased woman (Mrs. Montell) step off the platform because his view was blocked by a baggage-truck and an ice-truck on the platform. (R. 14, 17-18, 28-29.)

Exhibit 1A (R. 107, 153) is a drawing (to the scale 1 inch = 20 feet) of the track, platform, canopy, supporting posts and fence. There are two kiosks or stairways shown on Ex. 1A; the accident happened east of the east kiosk. From the east edge of the east kiosk it is approximately 370 feet to the east end of the canopy, and 560 feet (measured along the slightly curving platform) to the east end of the platform. To the east of the east kiosk Ex. 1A shows a line of 13 posts supporting the canopy, the 13th being about 5 feet from the east end of the canopy. East of the 11th post, and west of the 12th, Ex. 1A shows a crossing, about 10 feet wide, leading south from the platform, across the track, to a gate in the picket fence. Exhibit 1A shows the following distances:

From the east edge of the east kiosk to:

5th post	130 feet
6th post	160 feet
11th post	310 feet
west side of crossing	320 feet
east side of crossing	330 feet
12th post	340 feet

The witness Brewster testified that just before the accident he was standing at the 5th post waiting for the train here involved, that Montell talked to him briefly there and then moved about 20 feet "to his left", that is to the east. (R. 107-109; Brewster marked the 5th post on Ex. 1A, R. 109.)

The engineer testified that the baggage-and ice-trucks which blocked his view were at ". . . the east end of the

station . . . before you get to that canopy . . ." (R. 30.) Examining Ex. 2A (R. 8-9, 139), a photograph which looks east (R. 10), he testified the trucks were "just the other side of this crossing here." (R. 42.)

Mrs. Montell "stepped out slowly" (R. 110), "walked over to the second rail of the track" (R. 110, 117) and, according to the witness Nelson, proceeded to the fence. (R. 115.) There was at that point no opening in the fence, as the engineer knew. (R. 34.) The engineer testified that he observed her from the time she stepped over the rail nearest the platform but did not apply the brake until Montell turned and kneeled in front of the engine. (R. 34-35.) He then immediately put the brake into the last, or emergency notch, and left it there. (R. 27.)

At the time of the accident the plaintiff Henagan, a waitress employed by the defendant railroad, was standing at a counter in the forward part of the rear car of the train. (R. 46, 48-49, 55.) The train came to a stop, as a result of which all objects on the tables were thrown to the floor (R. 48, 57), and a fellow-employee, Driscoll, was thrown to the floor 20 feet away from where she had been standing in the rear of the car. (R. 54.) Driscoll, who had been employed in the same work since 1946 (R. 55), testified that normally the vibration of air in the brakes gives warning of a stop, but that in this case there was no warning whatsoever: "Just a sudden stop. Period." (R. 56-57.)

Immediately after the stop the plaintiff Henagan complained of pain, could not move her neck, was hysterical, could not continue to work, and was removed from the train. (R. 50.) The witness Steinfeld, who was not scheduled to work that day, immediately took over her job. (R. 46, 50.) Her father testified that he was at the station when she was brought to Boston; that she was then wearing a plastic collar round her neck; that she "didn't say a word", and did not recognize him until the day after

the accident; that he took her to the hospital where she was in the emergency ward for nine hours, and in the hospital for three weeks, that "they put her in traction" and "she was all tied up". (R. 63-65.) The hospital record shows the diagnosis "Acute neck strain. Hysterical reaction." (Ex. 6, R. 158, 160.) At a second hospitalization in 1957 the diagnosis was "Cervical radiculitis, with psychosomatic overlay." (Ex. 6, R. 158, 163.)

Ex. 7A (R. 164-165) shows that she worked as an employee of the defendant railroad in the year 1954 at the average rate of approximately $64.00 per week.

Prior to the accident the defendant was in good health, happily married, the mother of a twelve year old boy. She was active in outdoor sports, including Little League activities. (R. 72-73.)

A psychiatrist, whose qualifications were not challenged, testified that the plaintiff Henagan had no discoverable past history of mental disorder (R. 95); that she had an essentially normal school history, work history, history as a wife and mother (R. 98); that at the time of trial she was of unsound mind and incapable of remunerative employment (R. 84-85); that her appearance in the courtroom would in all probability cause her further serious injury because she believed that this case was a prosecution against her for the death of Montell. (R. 85, 86.) In his opinion she was suffering from paranoia, "a mental disease characterized by suspiciousness, by the presence of ideas of guilt and reference to one's self of events not connected with on's self." In the opinion of the expert witness her disease was caused by the accident of October 11, 1954 (R. 94-97.) Symptoms of the disorder became apparent shortly after the accident in the form of suspicion and hostility by the plaintiff toward her father, husband, son, and her mother, who died shortly before the trial of this case. (R. 65-69, 74-77, 98-99.) The psychiatrist testified that in his opinion

the disorder has become worse with the passage of time; that plaintiff is a very difficult patent to treat; that it is doubtful that her condition can be improved by treatment; that the only possibility of successful treatment would involve her residence in a hospital for a period of a year, at least, at a charge of thirty dollars per day, plus four or five psychiatric treatments per week at a cost of twenty dollars per treatment. (R. 87-90, 91-92.) It is agreed that plaintiff's life expectancy on the day of the accident was 34.6 years. (R. 155.)

The ruling of January 13, 1959 on the motion for judgment or for new trial was made at a hearing in open court (R. 155-157). In arguing the motion for judgment counsel for the railroad urged there was no evidence of negligence.

The trial court said:

> "You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier." (R. 156.)

Shortly thereafter the following occurred:

> "Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.
>
> The Court: This is a perfect case which I would be very happy to see nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.
>
> Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that it is all the stronger

case for a Motion for New Trial because I think it is apparent that the jury in this case disregarded the law as given by your Honor.

The Court: I cannot say that. I can only say that if this were a case in which a verdict was permissible for the plaintiff, then I don't think they disregarded my instructions. I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but I am not going to help you much here.

Mr. Deering: Well, then perhaps in view of that there is no need for me to continue further. (R. 157.)

Summary of Argument

A. Sufficiency of the Evidence.

How far was the engineer from Montell when she stepped off the platform? The Court of Appeal accepted his testimony that he was only 40 feet away. We cannot do so—we are entitled to the strongest, not the weakest, evidence. Let us ask a few questions:

1. Did the engineer see Mrs. Montell as she stepped off the platform?

   Answer: He says that he did not see her. (R. 14, 17-18, 21, 28-29.)

2. Was there an obstacle which blocked his view?

   Answer: He says that his view of Montell, as she stepped from the platform, was blocked by baggage-trucks on the platform. (R. 14, 17-18, 28-29.)

3. Does it follow that the baggage-trucks were closer to Montell than the engineer was, as she stepped from the platform?

   Answer: Yes, obviously.

Clearly the jury can't be criticized for inquiring about the distance between Montell and the baggage-trucks. The jurors would naturally ask:

4. Do we have a scale-plan of the track and platform?

   Answer: Yes, Exhibit 1A (R. 107, 153).*

5. Can we locate Montell on Ex. 1A?

   Answer: Yes. The witness Brewster said that he waited for the train at the 5th post east of the east kiosk or stairway and talked with Mrs. Montell there. Just before the train came she moved 20 feet to his left, which means 20 feet east, since he would be facing south waiting for the train. He marked the 5th post on Ex. 1A. (R. 107-109.)

6. Can we locate the baggage-trucks on Ex. 1A?

   Answer: Yes. The engineer says they were at the east end of the platform. (R. 30.) Later he said they were just to the east of the east crossing shown here on Ex. 1A—it's between the 11th and 12th posts. (R. 42; Ex. 1A.)

7. Here's a ruler—how far is it from the 5th post to the east side of the crossing?

   Answer: 10 inches—that means 200 feet. The scale is 20 feet to an inch.

8. If we subtract the 20 feet that Montell moved after talking to Brewster at the 5th post, that means she was 180 feet from the baggage-trucks when she stepped off the platform?

   Answer: Yes. At least 180 feet.

9. Then the engineer was even farther away from her when she stepped off the platform?

---

* The relevant part of Exhibit 1A is reproduced as Appendix A of this brief, the scale having been preserved so that measurements may be made. On Appendix A we have indicated the position of Montell and the baggage-trucks, as shown by the testimony of Brewster and the engineer.

Answer: Certainly. Otherwise the baggage-trucks would not have blocked his view.

Clearly the engineer's testimony, or guess, rather, that he was but 40 feet away, is exploded. But the jury's job is not finished:

10. We know he was more than 180 feet from Montell as she stepped off the platform. But where was he when he could first see her, when his view became unblocked?

    Answer: The baggage-trucks on the platform would no longer block his view once he drew abreast of them.

11. When and where was that?

    Answer: When he got to the east crossing and was 180 feet away from Montell. From there on the track is straight and nothing could block his view of Montell on the track.

12. Then, as he was going about 20 feet per second (13-15 m.p.h.; R. 12) he could have seen her for 9 seconds before he hit her?

    Answer: Yes.

13. And if he had been careful he would have seen Montell when he was 9 seconds away, and would then have started to apply his brakes to slow the train down?

    Answer: Yes.

14. If he had started to apply his brakes gradually when he was 9 seconds away the plaintiff, who was standing in the grill-car, would have been warned by the vibration of air in the brakes, would she not?

    Answer: That is the testimony of her fellow-employee Driscoll. (R. 56.)

15. It appears from the engineer's testimony that for 8 of the 9 seconds he did nothing, and then put the brake into emergency, causing a violent and sudden stop, with no warning to the plaintiff?

Answer: Yes. He says he put the brake over to the last notch and left it there. (R. 27.) Everything on the tables in the grill-car was thrown to the floor (R. 57), and the witness Driscoll was thrown 20 feet to the floor. (R. 54.) Driscoll says there was no warning: "Just a sudden stop. Period." (R. 56-57.)

If this were an action at common law by a passenger who was seated in the train, the evidence would clearly make out a case for the jury. *Dorr* v. *Lehigh Valley R.R.*, 211 N.Y. 369, 373-374. Here the exposed position of the plaintiff, required by her employment as a waitress, makes out a much stronger case.

B. Motion for New Trial.

Does an appeal from a judgment bring up error in a post-judgment order denying a motion for new trial? Two types of cases may arise:

1. Cases where the denial was an *abuse of discretion.*
2. Cases where the denial was a *failure to exercise discretion.*

In cases of the first type it will appear on a proper appeal that the motion, as a matter of law, must be granted. The appellate court can accomplish this only by reversing the judgment. An appeal from the judgment, therefore, is the necessary and proper method of carrying up this kind of error. *DiGiovanni* v. *DiGiovannantonio*, 233 F.(2d) 26.

In cases of the second type, however, it will not appear on a proper appeal that the motion must be granted, but only that it must be heard and decided. It is therefore neither necessary nor proper to reverse the judgment. Since correction of the error in no way affects the judgment, the proper appeal is not from the judgment but from the order denying the motion. *Magee* v. *General Motors Corp.*, 213 F.(2d) 899. *John E. Smith's Sons Company* v. *Lattimer Foundry and Machine Company*, 239 F.(2d) 815.

The case at bar is obviously of the second type. The kind of error petitioner claims here, a denial of the motion because of lack of power to grant it, would, if shown on a proper appeal, call for an order to the trial judge to hear and decide the motion. It would not call for a reversal of the judgment. Since the correction of the error in no way affects the judgment, an appeal from the judgment is not the proper way to bring it up. The Court of Appeal was precisely correct in its disposition of petitioner's appeal: *The judgment of the District Court is affirmed.* (R. 174.)

In any case petitioner has shown no error. The motion for new trial was not denied; it was waived in open court. At the hearing on January 13, 1959, the District Judge ruled that the jury had not disregarded his instructions. (R. 157.) He made it clear to counsel that the only question in his mind was whether as a matter of law "a verdict was permissible for the plaintiff." (R. 157.) As to that question he stated:

> "... I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but *I am not going to help you much here.*" (R. 157; emphasis added.)

After being thus told that the motion for new trial would not be granted, counsel for petitioner ceased to press that motion on any ground:

"Well, then perhaps in view of that there is no need for me to continue further." (R. 157.)

In view of this the District Judge had every right to think, and undoubtedly did think, when he disposed of the motion, that the only part of it which was still before him was the motion for judgment.

Finally, if any error occurred, petitioner was present in court when the ruling was made, and was bound, under Rule 46, to call it to the court's attention. If petitioner's counsel had done so there can be no doubt that the inadvertence would have been immediately corrected. In the circumstances the Court of Appeal was not bound to take notice of this alleged error urged for the first time on appeal.

Argument

I. There Is Ample Evidence to Support the Verdict.

This case is a strange compound of tragedy and geometry. One woman, Montell, is killed on the track. The other, the plaintiff Henagan, is physically injured by the violent stopping of the train, and caused, in the sequel, to believe that she is responsible for Montell's death. Here is a poor engineer, says the railroad, caught between these unbalanced females. What was he to do, it asks, when a madwoman threw herself in front of his train when he was but 40 feet away?

Nothing of the sort happened. Mrs. Montell did not plunge in front of the train—she *walked*. She *walked* on the track for 11 seconds at least before she was hit, and during 9 of those seconds she could have been seen by the engineer.

The basic geometry we shall discuss is established by Ex. 1A (R. 107, 153), a scale-plan of the track and platform. We have reproduced the relevant part of that exhibit

in Appendix A of this brief taking care to preserve its scale. With that before us, we ask, as the jury did: *How far was Montell from the engineer when she stepped off the platform?* The railroad says the situation was thus:

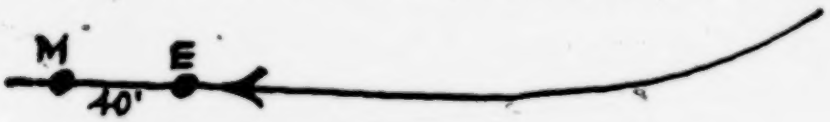

FIG. 1

This ignores vital evidence: *the engineer himself testified that he did not see M step off the platform because his view was blocked by a baggage-truck and an ice-truck on the platform.* (R. 14, 17-18, 28-29). The true geometry is not that of Figure 1. It is the following:

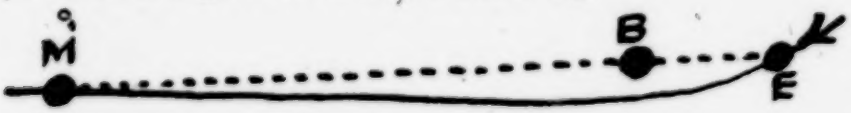

FIG. 2

Here B represents the baggage- and ice-trucks, and the dotted-line is the interrupted line of vision of E. An elementary law of optics, perceived and applied by the jury, tells us that MBE is a straight line. An equally elementary law of geometry shows that the distance ME must exceed the distance MB.

The jury had evidence before it from which it could locate M and B on Ex. 1A. First, as to M: the witness Brewster testified that he arrived on the platform via the stairway in the east kiosk shown on Ex. 1A; that he proceeded east to the fifth post and waited for the train; that Mrs. Montell engaged him in conversation and then moved to his left "about 20 feet or so". (R. 107-109; Brewster marked the fifth post on Ex. 1A, R. 109.) We submit that the jury could find that M left the platform between the fifth and sixth posts at the point we have indicated on Appendix A of this brief.

The engineer himself testified that the baggage-and ice-trucks which blocked his view were at ". . . the east end of the station . . . before you get to that canopy . . ." (R. 30.) Examining Ex. 2A (R. 139), a photograph which looks east (R. 10), he said the trucks were "just the other side of this crossing here" (R. 42). We submit that the jury could find that they were anywhere between the east crossing shown on Ex. 1A and the east end of the canopy. We have, on Appendix A, located them at the spot most favorable to the railroad: just to the east of the crossing at the edge of the platform.

Having located M and B on Ex. 1A the jury could draw a straight line through them and prolong it till it intersected the right hand-rail (Appendix A). It could find that E was at this intersection when M stepped off the platform. It could measure ME and find it to be 11 inches or 220 feet. *The jury could properly conclude that when M stepped off the platform, E was 220 feet, or 11 seconds away,* his speed being 13-15 miles per hour (R. 12):

FIG. 3

Unless he was at that point, his view of Montell, as she stepped from the platform, would not have been blocked.

So far E has not seen M. *When could he first have seen her?* Obviously when he drew abreast of the obstacles on the platform:

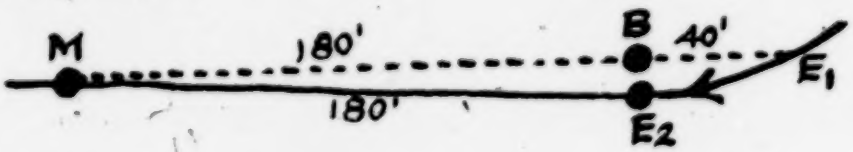

FIG. 4

(Approximately 2 seconds elapse between Figure 3 and Figure 4.) *The jury could properly find that when E got to the east crossing* (Ex. 1A; Appendix A) *he had a clear view of M on the track, and that M was then 180 feet or 9 seconds away.*

Clearly the jury could find that M was on the track for some 11 seconds before she was struck. No one says she plunged or jumped in front of the train. On the contrary: "she stepped out slowly" (Bowen, R. 113), "she walked toward the farther rail" (Meegan, R. 117; Dupere, R. 110). One witness says she went to the fence (Nelson, R. 115), before she turned back and kneeled, or squatted, or fell in front of the engine. For 9 seconds E saw or should have seen these movements, which indicate an obvious suicide, or perhaps merely a bewildered woman approaching a fence in which, *to E's knowledge,* there was no opening (Crafts, R. 34).

E took no action whatsoever during 8 of the 9 seconds. He then woke and brought the train to a sudden and violent stop. This would clearly take the case to the jury even in an action by a passenger at Common Law.

Dorr v. *Lehigh Valley R.R. Co.,* 211 N.Y. 369, 373-374.

The present case is stronger still, for it involves liability, not to a seated passenger, but to an employee whose duty as a waitress required her to stand. She was thus, to the knowledge of the railroad, peculiarly vulnerable in case of a sudden stop. Furthermore, had there been a partial application of the brakes preceding the final stop, she would have been warned of the danger, as the jury could find from testimony of her fellow-employee, Driscoll:

> "Q. Have you become aware as a general matter when a train stops in your experience—do you become aware of that stopping in some way? A. Well,

only through vibration, feeling the air going on the train for brakes; you feel a sudden vibration which you are quite used to, even approaching every stop you feel a certain vibration. You're acclimated to that.

• • •

"Q. Generally, when brakes are applied when the train comes to a stop, are you made aware of it through some kind of vibration? A. Yes.

"Q. Which occurs before the train finally comes to a stop? A. Yes." (Driscoll, R. 56.)

Here there was no warning whatsoever:

"Q. Now did anything of that kind happen in this particular case on October 11, 1954? A. No. No, it was a sudden stop.

• • •

"The Court: Just a moment. You are being asked there was no vibration before this train came to a stop.

"The Witness: No. None that I remember of, your Honor. Just a sudden stop. Period." (Driscoll, R. 56-57.)

The Railroad's Position

The rail-oad entirely omits from its "Statement" (Def. Brief 2-8) the engineer's testimony that his view was blocked. Counsel saw, however, that the testimony would not simply go away. If the engineer's view of Mrs. Montell was blocked when he was 220 feet away, they now say, it was blocked at a time when nothing important was happening. Had no trucks been there he would have seen Mrs. Montell "... on the platform in a safe position, presumably a passenger waiting to take the train." (Def. Brief 15-16.)

The engineer directly contradicts this proposition, for

he says that the trucks prevented him from seeing Mrs. Montell *as she stepped from the platform:*

> Q. . . . Here is the platform (illustrating). I have my foot on it. Now when I say you didn't see her step off the platform on to the track I mean you never saw her when she had one foot on the platform?
> A. No, Sir.
> Q. No doubt about that?
> A. No, Sir.
> Q. And you say there was something that stopped you from seeing her?
> A. Well, that's why I said I corrected my statement* afterwards. *There was these trucks out there* that I changed my mind about after I had the investigation. I went out, back, and asked them if the trucks were there, and they said, yes. (R. 28-29, emphasis added.)

It is clear, moreover, from his other testimony that *he first saw her immediately after he had passed the trucks and his vision became unblocked.* (See Appendix A, hereto.) At that time he was 180 feet from her, and she was stepping over the rail nearest the platform:

> Q. Can we begin this way? The platform is over here where I am standing. Let us assume that.
> A. Yes.
> Q. Did you see her there?
> A. No, sir.
> Q. All right. Let us assume the first rail is right here. Did you see her before she got to the first rail?

---

* The witness obviously refers to his previous testimony at R. 23. The "statement" he now proceeds to correct (R. 29-30) is the one he made to the railroad people on October 12, 1954, the day after the accident. That statement is Ex. 4 (R. 19-23).

A. Before she got to the first rail?
Q. Yes.
A. I didn't see her until she got her foot over the rail, in the middle of the rails. (R. 31.)

Counsel for the railroad say:

> "... The woman would have taken, at most, one step from the place of safety on the platform to the place of danger on the tracks, and it was while she was taking this step *or a second step* that the engineer first noticed her ..." (Def. Brief 16, emphasis added.)

A *second* step, gentlemen, most certainly a *second* step! For it was 2.5 feet from the edge of the platform to the nearest rail. (Ex. 1A.) This woman who "stepped out slowly" (R. 113) did not at her first step land between the rails. That happened on her second step.

The jury could plainly find the following sequence of events:

Event 1	Engineer's vision of Mrs. Montell blocked by truck on platform.	Mrs. Montell takes first step from platform, placing her foot between platform and nearest rail.
Event 2	Engineer moves up abreast of trucks. His vision of Mrs. Montell no longer blocked.	Mrs. Montell takes second step, moving her foot over the nearest rail and placing it between the rails.

The only remaining question is: How far was the engineer from Mrs. Montell when Events 1 and 2 occurred? We

have shown above that he was *220 feet*, or 11 seconds away when his vision was *blocked*, and *180 feet*, or 9 seconds away, when it became *unblocked*. That showing is summarized on Appendix A, hereto, and is in no way attacked by the railroad. Counsel for the railroad do not now see it for the first time, as it was attached also to our Brief in Opposition to the Petition for Certiorari.

If the engineer first saw Mrs. Montell when he was 9 seconds away, and did nothing for 8 seconds, there can be no question that the jury could find negligence. Quite wisely counsel for the railroad do not attempt to dispute this.

The Opinion of the Court of Appeal

The common sense of the jury perceived the elementary geometry involved here. Quite naturally the jury concluded that an engineer who was approaching a woman in his path at 20 feet per second, and who took no action for 8 seconds, was not careful, whether the woman was a suicide or was merely trying to find an opening in the fence.

Both courts below were so powerfully affected by the word "suicide" that they failed to see the geometry. "Sudden stop caused by appearance of suicide" easily became "sudden stop caused by *sudden* appearance of suicide". It became impossible for either court to understand that the engineer was far more than 40 feet away when the "suicide" appeared. Where's the liability, thinks the trial judge: ". . . perfect case . . . to see nine men treat." (R. 157.) Similarly the Court of Appeal thinks there is only "the faintest scintilla of evidence." (R. 173.) We are now invited by the defendant, in its Point I, to parse and construe the opinion of the Court of Appeal with a view to determining the sufficiency of a "faintest scintilla".

We shall not do so. We are discussing a real case, not

an abstract one; putting forward real evidence, not the emasculated evidence considered by the Court of Appeal. It is now plain to us that one who claps his eye to a telescope and begins to search for scintillas or scintillulas runs some risk of failing to see a body of the first magnitude, visible to the naked eye. We wish to avoid that risk. We need not and do not ask the Court to apply any extreme rule as to the required quantity of evidence; we are content with a rule no stronger than the common-law rule as applied in cases like *Dorr* v. *Lehigh Valley R.R.*, supra. We ask only that the Court judge with *the naked eye* whether such an exacting rule is not abundantly satisfied by the evidence in this record. We ask particularly that the Court carefully examine, and test by the record, Appendix A, hereto attached.

II. No Error Appears in the Disposition of Petitioner's Motion for New Trial.

Petitioner claims its motion for new trial was denied as a matter of law on January 13, 1959. It did not appeal from that order, its only appeal being from the judgment of January 8. (R. 135.) The Court of Appeal held that the disposition of the motion for new trial was not presented by the appeal from the judgment. (R. 174.)

Petitioner argues that an appeal from a judgment always includes within its scope error committed in a post-judgment order denying a new trial. But the matter is not so simple—one must examine the kind of error involved. As a general matter, an order denying a new trial is not appealable or reviewable at all, because it is a matter within the discretion of the trial judge. The rare cases where review may be had fall into two categories:

1. Cases where the denial was an *abuse of discretion.*

2. Cases where the denial involved a *failure to exercise discretion.*

We agree that both types of cases are reviewable. The question is: by what method? Is it the same in both types of cases, as petitioner contends?

In cases involving an abuse of discretion the record will show, on a proper appeal, that the motion was fully heard, and that the trial judge, as a matter of law, arrived at an erroneous conclusion. The appellate court must grant the new trial which the trial judge erroneously denied. The appellate court can do this only by setting aside the judgment. It can set aside the judgment only on an appeal from the judgment. It follows that where the denial of a new trial results from abuse of discretion, the error is reviewable on appeal from the judgment. *DiGiovanni* v. *DiGiovannantonio*, 233 F.(2d) 26, cited by petitioner (Brief, p. 23), is such a case.

A quite different question is presented where the denial of the motion results from a failure to exercise discretion. Here, on a proper appeal, it will not appear that the motion was fully heard. It will not appear that as a matter of law the motion must be granted. All that will appear is that the trial court did not exercise the discretion which it in fact possessed. The appellate court cannot, therefore, grant the motion—all it can do or ought to do is order the trial court to exercise its discretion. It can make such an order without affecting the judgment in any way. There is therefore no need of an appeal from the judgment in this type of case. Furthermore, if an appeal from the judgment is taken, plainly the judgment must be affirmed, unless error of some other kind, not connected with the denial of the motion for new trial, be shown. Since correction of the failure to exercise discretion in no way affects the judgment, the proper appeal in such a case is not from the

judgment but from the order denying the motion. *Magee* v. *General Motors Corp.*, 213 F.2d 899 (3d Cir.). *John E. Smith's Sons Company* v. *Lattimer Foundry and Machine Company*, 239 F.2d 815 (3d Cir.).

There is no doubt that the case at bar, if it involves any error at all, is a case of the second type, where the alleged error consists in a failure to exercise discretion. Petitioner fully agrees:

> "... The issue, therefore, before the Court of Appeals was not one of abuse of discretion, but rather the power of the trial judge to exercise his discretion to set aside the verdict and grant a new trial." (Brief, p. 21.)

We submit, in accordance with the above analysis, that such an error cannot be brought up by an appeal from the judgment. An appeal from the order denying the new trial is necessary.

DiGiovanni v. *DiGiovannantonio*, 233 F.2d 26 (D.C. Cir.) does not help petitioner. That involved an abuse of discretion. The motion for new trial was on the ground of newly discovered evidence. It appeared to the Court of Appeal that the evidence could not have been made available at the trial, and that it had a vital bearing on the issues. The Court of Appeal concluded that the motion ought to have been granted, and did grant it, setting aside the judgment. It held, quite rightly, that an appeal from the judgment was the proper way to carry up that question.

Nor is petitioner aided by *Magee* v. *General Motors Corp.*, 213 F.(2d) 899 (3d Cir.) which it cites at pp. 21-22 of its brief. We agree that in the *Magee* case "the trial judge had denied a motion for a new trial for reasons similar to those given by the trial judge in the case at bar."

(Petitioner's brief, pp. 21-22.) The error involved was a failure to exercise discretion. But the petitioner has overlooked the fact that the appeal in the *Magee* case was not an appeal from the judgment. It was "an appeal by the defendant from the refusal of its motion for a new trial." 213 F.2d 899, 900. This is precisely the appeal the petitioner in this case should have taken, but did not take.

In any case it appears that the trial court did not deny the motion for new trial as a matter of law. The written notation made by the trial judge on the alternative motion (R. 133) was made after the petitioner had waived in open court that part of the motion which asked for a new trial. That written notation therefore applies only to that part of the alternative motion which asked that judgment be entered for petitioner.

At the start of the hearing of January 13, 1959, defendant's counsel cited and discussed *Herdman* v. *Pennsylvania R.R. Co.*, 352 U.S. 518 (R. 155.) That case, he urged, decided that it could not be negligence for an engineer of a train to make a sudden stop when met with an emergency. (R. 155-156.) To this the Court remarked:

> "You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier." (R. 156.)

In making this remark, we submit that the trial judge passed upon and denied grounds 1 and 2 assigned in the motion for new trial. Those grounds are as follows:

> "1. That the verdict is contrary to the evidence and against the weight of the evidence;
> "2. That the verdict is against the law applicable to the evidence . . ." (R. 132.)

That conclusion, we submit, is reinforced by the next succeeding remark of the court made after an interjection by Mr. Deering:

> "The Court: You persuaded the thirteenth juror, but not the twelve." (R. 156.)

Shortly thereafter (R. 157) there occurred the following:

> "Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.
>
> "The Court: This is a perfect case which I would be very happy to see how nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.
>
> "Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that *it is all the stronger case for a Motion for a New Trial because I think it is apparent that the jury in this case disregarded the law* as given by your Honor.
>
> "The Court: *I cannot say that.* I can only say that if this were a case in which a verdict was permissible for the plaintiff, then *I don't think they disregarded my instructions.* I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, *but I am not going to help you much here.* (italics supplied.)

Here, we submit, the judge again ruled that he did not regard the verdict as being against the law as given by him to the jury in his instructions, and again denied the first and second grounds assigned in the motion for new

trial. *He further indicated definitely that he would not grant that motion.* At that point, we respectfully submit, Mr. Deering acquiesced, and ceased to press the motion for new trial on any ground, for he then said to the court:

> "Well, then, perhaps in view of that there is no need for me to continue further." (R. 157.)

All this occurred before the trial judge read the endorsement on the motion. (R. 133.) That endorsement, therefore, in no way relates to the motion for new trial but only to the motion for judgment notwithstanding the verdict.

If we are wrong about the conclusion we have just stated, it is plain that when the ruling was announced the petitioner was bound to call to the trial judge's attention his objection to it. This duty arises under Rule 46 of the Federal Rules of Civil Procedure:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Unquestionably petitioner had an opportunity to object when the ruling was made. If the ruling be interpreted to apply to the motion for new trial, as petitioner desires, it was obviously an inadvertence which would have been corrected at once had it been called to the attention of the court. Since the petitioner failed to do this, the Court

of Appeal was not bound to take notice of the objection when urged for the first time on appeal.

Conclusion

For the reasons above stated it is respectfully submitted that no error appears in the judgment of the Court of Appeal, and that that judgment must be affirmed.

Respectfully submitted,

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Eastern stairway.

Location of witness Brewster at 5th post east of stairway. (Brewster DRA 107 -108).

KIOSK

POSTS

Location of Mrs. Montell as she left platform, per witness Brewster. (DRA 107 -- 109).

ETC.

Position of baggage and ice-trucks per testimony of engineer Crafts (DRA 30, 1.) These obscured his view of Mrs. Montell as she stepped from platform. (Crafts, DRA 17, 28 - 29.)

[redacted]

T. SHELTER

WOOD

GATE

When engineer reached this point he had clear view of Mrs Montell on the track 180 feet away.

Position of engineer when Mrs. Montell stepped off platform.

APPENDIX "A"
(Based on Ex. 1A and testimony of Brewster and Crafts.)
Red line indicates line of sight of engineer at instant Mrs. Montell stepped off platform.

N. Y. N. H. & H. R. R. Co.

BOSTON DIVISION MAIN LINE

PLAN SHOWING PORTION OF TRACK #3 & PLATFORM UNION STATION

PROVIDENCE, RHODE ISLAND

SCALE 1" = 20'

SURVEY BY AEF BK #4 P 17 20

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1960.

New York, New Haven and Hartford Railroad Company, Petitioner, v. Mary L. Donnelly Henagan.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[November 21, 1960.]

Per Curiam.

The respondent was a waitress in the grill car of one of petitioner's trains. She brought this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, for damages for injuries allegedly sustained when an emergency application of the brakes brought the train to a sudden stop. A jury which heard the case in the District Court for the District of Massachusetts returned a verdict for respondent. The trial judge denied the petitioner's motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeals for the First Circuit affirmed, 272 F. 2d 153. We granted certiorari, 362 U. S. 967.

The train was pulling into petitioner's station at Providence, Rhode Island, for a scheduled stop. One Montell, apparently to commit suicide, stepped on the track from the station platform as the train approached alongside the platform. The engineer made the emergency application of the brakes in an unsuccessful effort to stop the train before it reached Montell. We have examined the trial record and hold that the proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the respondent's injury. See *Herdman* v. *Pennsylvania R. Co.*, 352 U. S. 518.

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The judgment of the Court of Appeals is reversed and the cause remanded to the District Court with direction to enter judgment for the petitioner notwithstanding the verdict.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. They believe there was evidence of negligence sufficient for the jury, as summarized by Judge Woodbury, speaking for a unanimous Court of Appeals. 272 F. 2d 153. They also dissent from the direction to enter judgment for the defendant, since they are of the view that if there is a reversal, there should be a new trial. *See Galloway* v. *United States*, 319 U. S. 372, 396 (dissenting opinion).

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari was improvidently granted.